No. 10-622

In the Supreme Court of the United States

S&M BRANDS, INC., TOBACCO DISCOUNT HOUSE #1, AND MARK HEACOCK,

Petitioners,

v.

JAMES D. "BUDDY" CALDWELL, in his official capacity as Attorney General of the State of Louisiana,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant a petition for certiorari to consider the applicability of *Parker v. Brown* state-action immunity to the Master Settlement Agreement ("MSA") among 46 states and various tobacco companies, even though the courts of appeals have uniformly held that the MSA and related legislation are not subject to challenge under the antitrust laws, and even though the issue of *Parker* immunity was neither properly raised in nor decided by the court below.

2. Whether this Court should grant a petition for certiorari to review the ruling of the court below that the MSA does not violate the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, even though that ruling expressly applied the controlling decisions of this Court and reached the same result as every other court that has considered a Compact Clause challenge to the MSA.

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INTRODUCTION

This case is the latest in a long series of challenges to the 1998 tobacco Master Settlement Agreement ("MSA") and the legislation that the 46 states that are parties to that Agreement ("Settling States") have enacted to implement it. More than twenty such challenges have been brought in federal court, and all have been rejected. In six of those cases, this Court has denied petitions for certiorari premised on the same statutory or constitutional provisions – the Sherman Act and the Compact Clause – that are the basis of the instant Petition. The Petition provides no reason why the Court should review this consistent and settled jurisprudence.

The MSA is a "landmark agreement," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001), that addresses "tobacco use, particularly among children and adolescents," which this Court has recognized as posing "perhaps the single most significant threat to public health in the United States." *Id.* at 570 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)). The Agreement was signed by the Attorneys General of 46 Settling States. It was thereafter endorsed by the legislatures of those States, all of which have enacted legislation to implement it. The Agreement was also expressly "approved in all respects" by courts in each of the Settling States, all of which found that "entering into this settlement is in the best interests of the State." *See, e.g.*, *Ieyoub ex rel. Louisiana v. American Tobacco Co.*, No. 96-1209 (Dec. 11, 1998, 14th Judicial District, Calcasieu

Parish). In addition, Congress has recognized the existence of the MSA, approving the states' use of MSA payments "for any expenditures determined appropriate by the State[s]." 42 U.S.C. §1396b(d)(3)(B).

As Petitioners acknowledge, Pet. 35, there is no circuit conflict on either issue raised in the Petition. Petitioners assert instead that the courts below erred. Their arguments, however, rest on allegations about the MSA's effects that the courts below rejected based on the undisputed facts contained in a summary judgment record. The rulings below expressly follow longstanding precedents of this Court. Indeed, challenges to the MSA or to the actions of state officials enforcing MSA-related legislation have been rejected by the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits.[1] Moreover, given the unique circumstances that led to the MSA, there is little prospect that the same issues will arise in the future, nor is there a need for the Court to exercise its supervisory powers.

For these reasons, the Petition, like the many similar petitions that have come before, should be denied.

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[1] In addition to the decision below and those cited *infra* on page 18, *see Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010); *KT&G Corp. v. Attorney Gen. of State of Oklahoma*, 535 F.3d 1114 (10th Cir. 2008); *Tritent Int'l Corp. v. Kentucky*, 467 F.3d 547 (6th Cir. 2006); *North American Trading Co. v. National Ass'n of Attorneys Gen.*, Civ. Action No. 01-01600 (D.D.C. Sept. 18, 2001), *aff'd*, No. 01-7173 (D.C. Cir. Nov. 25, 2002).

STATEMENT

A. The Master Settlement Agreement and Escrow Statutes

1. Beginning in the mid-1990s, a large number of states, including Louisiana, sued the major cigarette manufacturers on a number of legal theories, seeking to recover the Medicaid costs and other damages they had incurred as a result of smoking-related disease. In 1997, the states and major tobacco manufacturers agreed on a proposed settlement whose implementation was conditioned on the enactment of federal legislation. This legislation failed to be enacted, which led to further negotiations that culminated in the MSA.

Petitioners claim that the 1997 proposed settlement was "similar to the MSA in most relevant respects," and suggest that because that settlement required federal legislation to be implemented, the MSA must be legally deficient because Congress did not enact or approve it. Pet. 10-11, 30-31.[2] Petitioners also suggest that the Federal Trade Commission's criticisms of the 1997 proposed settlement as having potentially anti-competitive consequences apply equally to the MSA. In fact, however, the 1997 proposed settlement was different in many respects from the MSA. Among other things, it would have limited the tobacco companies' future liability in actions brought by private parties and would have given the Food and Drug

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[2] As discussed *infra* at 33-35, Congress did in fact consent to the MSA.

Administration broad authority to regulate tobacco products. S.1415, 105th Cong., 1st Sess. Moreover, the FTC's criticism was addressed to a provision of the settlement that would have expressly allowed the tobacco companies to "jointly confer, coordinate, or act in concert" to achieve the goals of the settlement, which the Commission was concerned would have conferred on the tobacco companies "a broad degree of immunity from the antitrust laws," and had "the potential to reduce competition and enhance the ability of the cigarette companies to 'coordinate' price increases." FTC, *Competition and the Financial Impact of the Proposed Tobacco Settlement* (September 1997), at ii, A-2. The MSA, in contrast, in no way authorizes the companies that have signed it to confer, coordinate, or act in concert, nor is there anything in the MSA or elsewhere purporting to exempt them from antitrust liability for any action taken before or after the MSA went into effect.

2. After further negotiations among representatives of the states and major tobacco companies following the failure of the 1997 proposed settlement, the MSA was made available for signature by any state that wished to sign it. Forty-six states and six other governmental jurisdictions, which are collectively referred to in the MSA as the "Settling States," did so. As noted above, courts in all Settling States subsequently found the MSA to be in the "best interests" of the state and "approved [it] in all respects." (Four states (Florida, Minnesota, Mississippi, and Texas) had earlier entered into separate settlements with the major tobacco companies – settlements whose provisions do not

differ from those of the MSA in any material respects.) The manufacturers that agree to the MSA are referred to as "Participating Manufacturers," or "PMs." Those manufacturers that settled pursuant to the MSA as of its execution date are referred to as "Original Participating Manufacturers" ("OPMs"), while those manufacturers that have since settled are referred to as "Subsequent Participating Manufacturers" ("SPMs").

The MSA's objectives were to resolve the states' tobacco litigation while addressing the states' public health concerns regarding tobacco use, particularly by youth. To achieve these objectives, the MSA settled and released the states' past and future claims against the Participating Manufacturers. In exchange, the OPMs agreed to make billions of dollars in Initial Payments to the Settling States over the MSA's first five years. MSA §IX(b). And all PMs – not only the OPMs – agreed to make billions of dollars more in Annual Payments to the Settling States each year in perpetuity and to restrict their advertising, marketing and promotional practices. MSA §§IX(c), III. The MSA significantly promotes public health in a variety of ways vital to reducing tobacco use, especially among minors. It does this through the marketing restrictions mentioned above, the establishment of a foundation dedicated to research and education regarding tobacco use prevention and cessation, and by the imposition of per-cigarette settlement costs that through ordinary market behavior are passed through in whole or part in the form of increases in the price of cigarettes.

The MSA has had a dramatic, positive impact on public health, and this will likely increase over time. Because most smokers begin to smoke by the time they reach the age of 19, reductions in youth smoking will almost certainly translate into reductions in smoking in the overall population. Indeed, because of the MSA and other measures, cigarette consumption declined 24% between 1997 and 2007. *Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d 684, 687 (S.D.N.Y. 2009), *aff'd*, 624 F.3d 38 (2d Cir. 2010). These consumption declines will, in turn, lead to a substantial reduction in death and disease caused by smoking and will have a beneficial impact on the finances of the Settling States as the costs of medical care for – and the productivity losses resulting from – smoking-related diseases also decline.

The PMs' payments under the MSA are non-discretionary and are calculated according to precise formulas tied to the number of cigarettes each PM sells in a given year, reflecting the fact that the harm the manufacturer's cigarettes cause will vary depending on how many of its cigarettes are consumed. PM per-cigarette payments do not vary with PMs' market share. Nothing in the MSA or any state statute authorizes or requires the PMs to take any action – joint or otherwise – with respect to prices or output, nor does any provision limit any cigarette manufacturer's freedom to set its own prices and output. To date, the Settling States have received approximately $74.7 billion pursuant to the MSA, of which Louisiana's share has been about $1.7 billion.

3. Each MSA Settling State has enacted an "Escrow Statute" that requires every cigarette manufacturer either: (a) to become a Participating Manufacturer and generally perform its financial obligations under the MSA, or (b) if it remains a Non-Participating Manufacturer ("NPM"), to deposit a specified amount into an escrow account for every cigarette it sells in the state. *See, e.g.*, La. R.S. §13:5063. NPMs do not make payments to the Settling States, nor are they bound by the MSA's marketing restrictions. Under a state's Escrow Statute, the amount an NPM must deposit in escrow is a statutorily specified amount for each of the NPM's cigarettes sold in that state and is guaranteed not to exceed what the NPM would have to pay under the MSA on account of its sale of those same cigarettes if it were to settle with the Settling States as a PM. *Id.* §13.5063(A), (C)(2)(b). Escrow deposits may be withdrawn to pay a tobacco-related liability or settlement to the state. To the extent they are not so used, they are released to the NPM after 25 years. In the meantime, the NPM receives interest on the account as it is earned. *Id.* §13.5063(C)(2)(c). The Louisiana statute addresses the concern that non-settling manufacturers would likely be judgment-proof absent the escrowed funds, and reflects the legislature's judgment that "[i]t is the policy of this state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts." *Id.* §13.5061(4). The statute thus provides Louisiana with security

for potential liabilities of NPMs while significantly reducing what would otherwise be a "free rider" MSA-related cost advantage for NPMs. *Id.* §13.5061(6).

Notwithstanding the escrow requirement, the MSA has provided an enormous opportunity for existing tobacco companies that chose to remain NPMs, such as Petitioner S&M Brands, as well as new entrants into the United States cigarette market that do not wish to become PMs. As the district court found in *Freedom Holdings*, NPMs had a total market share of 0.5% in 1998, when the MSA was signed. That share mushroomed to 8.1% in 2003, assisted in part by shortcomings in the Escrow Statute. Even after those shortcomings were remedied, NPMs' total market share was 5.4% in 2007, or more than ten times their 1998 share. 592 F. Supp. 2d at 691-92. (A significant portion of the reduction in NPM market share from 2003 to 2007 occurred because a large NPM became an SPM in 2004. *Id.* at 691 n.5.)

B. Petitioners' "Interstate Cartel" Allegations

Petitioners assert as fact their own unproven and unfounded allegation that "the MSA set up an interstate cartel enabling" the tobacco companies "to charge monopoly prices and recover their MSA costs, plus hefty additional profits, from consumers without fear of price competition among themselves or from non-participating cigarette manufacturers." Pet. 4. None of the arguments made in support of that allegation survives scrutiny, and none has resulted in any court finding that the MSA or its

implementing legislation violates – or is inconsistent with – the Sherman Act.[3]

1. According to Petitioners, the MSA "discourages price competition for market share by allocating the costs of the MSA among the Majors [OPMs] in proportion to their *current* national market share of cigarette sales." *Id.* (emphasis in original). Allocation of payments based on market share, however, simply means that each OPM pays the same amount to the Settling States for each cigarette it sells – *i.e.*, the MSA payment obligation imposes a flat per-cigarette cost that is the same for each OPM. Such an allocation creates no more disincentive for an OPM to compete based on price or to gain market share than does an excise tax, because each OPM pays the same per-cigarette amount no matter how large or small its market share.[4]

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[3] Petitioner claims that the Second Circuit, in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), "recognized that . . . 'the MSA' is an 'express market sharing agreement' . . . ." Pet. 16-17. As the Second Circuit itself later explained, however, it was "[a]ccepting plaintiffs' allegations as true, as we were required to do in reviewing a judgment of dismissal." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d at 45. On remand, the district court, like every other court to consider those allegations, rejected them and entered judgment for the state. *Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d 684 (S.D.N.Y. 2009), *aff'd on other grounds*, 624 F.3d 38 (2d Cir. 2010).

[4] In general, each OPM pays an amount calculated by multiplying its share of OPM volume (expressed as a percentage) times the OPMs' total payment. MSA §IX(c). The total payment is adjusted each year for changes in total OPM

Petitioners further allege that the MSA "discourages price competition and divides the market" among SPMs that signed the MSA within 90 days of its execution date. Pet. 5. These "grandfathered SPMs" are obligated to make MSA payments only to the extent that their sales exceed the higher of their 1998 market share or 125% of their 1997 market share. MSA §IX(i)(1), (4). According to Petitioners, this means that to the extent grandfathered SPMs exceed their grandfathered market shares, they "are penalized by having to make MSA payments on excess sales." Pet. 5. Grandfathered SPMs, however, have lower average costs than do other PMs because the grandfathered portion of their sales is exempted from MSA payments. Moreover, once their sales exceed their grandfathered market shares, their per-cigarette marginal costs are no greater than those of other PMs. Accordingly, SPMs are in no way "penalized" for engaging in price competition and gaining market share, nor does the MSA in any way "divide the market."

Petitioners also state that the MSA "stabilizes prices and limits price competition from all other manufacturers joining the MSA after 90 days by imposing annual MSA payments on those manufacturers based on their entire national market share" that are larger than the per-cigarette payments required to be made by OPMs. Pet. 5.

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volume, *id.* Exhibit E, which keeps each OPM's per-cigarette payment constant from year to year. Payments are also adjusted for inflation.

Petitioners are correct to the extent that OPMs receive a "Previously Settled States Reduction" (currently about 12.24% of their MSA payments), whereas SPMs do not. MSA §§II(kk), IX(c)(1). This Reduction, however, only partially offsets the settlement payments the OPMs make to the four states that settled separately with them, and thus operates like a partial tax credit for those other payments. The SPMs, however, did not settle with those states and thus receive no credit. In the aggregate, each OPM actually pays somewhat more for each cigarette it sells anywhere in the United States than do later-signing SPMs, which are not inhibited in their ability to compete on price.

2. In support of their "interstate cartel" characterization, Petitioners also contend that the MSA restrains competition "by forbidding numerous forms of advertising, as well as lobbying and litigation adverse to the MSA," and that many of these restrictions apply nationwide. Pet. 5. The MSA, however, is a settlement of litigation that included allegations of unlawful advertising in violation of state laws. For example, Louisiana's lawsuit against the major tobacco companies alleged, among other things, that "[f]or many years the defendants have engaged in a vast misleading promotional, public relations, and lobbying campaign that has as its chief goal increasing the number of persons addicted to tobacco products and decreasing the number of persons who attempt or succeed in quitting." *Ieyoub ex rel. Louisiana v. American Tobacco Co.*, No. 96-1209 (Mar. 12, 1996 14th Judicial District, Calcasieu Parish), Petition ¶ 61. The restrictions in Section III of the Agreement,

which settled those allegations and similar allegations by other states, are akin to an assurance of voluntary compliance following settlement of a consumer fraud complaint. They do not prohibit advertising generally nor is their purpose to divide markets, unlike the restrictions in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), Pet. 16. Moreover, each Settling State can enforce these restrictions only against violations in its own territory. MSA § VII(c).

3. Petitioners also allege that the MSA "stabilizes prices and limits price competition from" NPMs "by requiring member States to enact" Escrow Statutes "compelling NPMs to pay into escrow each year an amount equal to or greater than the MSA payments on comparable sales." Pet. 5-6. States are not required to enact Escrow Statutes, although the MSA creates a strong economic incentive for them to do so. Each Settling State's Escrow Statute "establishes a state regulatory scheme that does not require or allow any input from private parties." *Xcaliber Int'l Ltd. LLC v. Caldwell*, 612 F.3d 368, 376-77 (5th Cir. 2010). Unlike *National Electrical Contractors Ass'n, Inc. v. National Constructors Ass'n*, 678 F.2d 492 (4th Cir. 1982), Pet. 16 n.9, therefore, this is not a situation in which private parties have entered into an agreement to impose costs on competitors; those costs are imposed by statute by the states.

The stated goal of the Escrow Statutes is to "effectively and fully neutralize[] the cost disadvantages that the Participating Manufacturers experience *vis-à-vis* Non-Participating

Manufacturers within . . . [each] Settling State as a result of" the MSA's provisions. MSA §IX(d)(2)(E). As noted above, the Statutes expressly provide that an NPM cannot be required to pay more into escrow than it would have paid under the MSA for the same cigarettes had it signed the MSA as an SPM, including any downward adjustment to which such an SPM would have been entitled. *See, e.g.*, La. R.S. §13.5063(C)(2)(b). As the Second Circuit has held, the Statutes "can be analogized to the imposition of a flat tax . . . whose only arguably 'anti-competitive' effect is to raise cigarette prices," and they otherwise allow "normal market mechanisms [to] function." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d at 56, 59, 62 (2d Cir. 2010).

4. Experience under the MSA has confirmed the foregoing conclusions. As the *Freedom Holdings* district court found after examining the evidence in that case, "[t]he updated reports reveal that the payment structure of the MSA does not favor the major cigarette companies over those companies that either did not join the MSA, or joined the MSA at some later date." 592 F. Supp. 2d at 691. The MSA and Escrow Statutes have internalized in the price of the cigarette manufacturers' products a portion of the social costs of the death and disease caused by smoking, but there is no evidence – and no court has found – that they have permitted or authorized any cigarette manufacturer to fix prices, limit output, divide markets or charge monopoly prices, or that they have discouraged price competition.[5]

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[5] *Amici* Constitutional Law Scholars and Antitrust Law Professors uncritically accept Petitioners' allegations as true,

C. The Proceedings Below

1. Petitioners' complaint, filed August 2, 2005, pleaded several constitutional theories in support of their claim that the Louisiana Attorney General should be enjoined from enforcing the MSA and the Louisiana Escrow Statute. Count I alleged a violation of the Compact Clause. Although as part of their Compact Clause count Petitioners alleged that "[t]he MSA and its Qualifying Statute encroach upon federal supremacy by patently violating the federal antitrust laws, including the Sherman Act," Complaint ¶ 62, there was no separate Sherman Act-based count. Nor did Petitioners plead as a basis for the district court's jurisdiction a claim brought under the antitrust laws. *See* 15 U.S.C. §15(a).

The Louisiana Attorney General filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on November 2, 2005. The motion was referred to a Magistrate Judge, who issued his Report on September 5, 2006, recommending that the complaint be dismissed in its entirety. In doing so, the Magistrate Judge observed that "[i]f the MSA actually violates antitrust laws, . . . a party with proper standing may bring a suit under those laws to enforce them. But the potential for such claims does

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apparently without having any familiarity with the summary judgment record in this case or even the numerous judicial decisions rejecting those allegations. For their part, *amici* Freedom Holdings, Inc. and International Tobacco Partners Ltd. simply repeat some of the same arguments they made in their own unsuccessful antitrust challenge to the MSA. *Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d 684 (S.D.N.Y. 2009), *aff'd on other grounds*, 624 F.3d 38 (2d Cir. 2010).

not require the court to annul the MSA as a violation of the Compact Clause." Report at 20-21. Petitioners filed objections to the Magistrate's Report but did not contend that their antitrust allegations formed the basis for a claim separate from their Compact Clause claim. On November 9, 2006, the district court issued an order stating that it was "inclined to agree with the reasoning" of the Magistrate Judge's Report, but that it was "constrained by" the Fifth Circuit's reversal of the grant of a motion to dismiss similar claims in *Xcaliber International Ltd. LLC. v. Foti*, 442 F.3d 233 (5th Cir. 2006). Accordingly, the district court accepted the Magistrate Judge's recommendation to dismiss the complaint only as to Petitioners' Tenth Amendment claim. Petitioners did not amend their complaint to plead a separate antitrust claim, although they could have done so as of right under Fed. R. Civ. P. 15(a).

2. After Petitioners conducted substantial discovery directed to the Louisiana Attorney General and the National Association of Attorneys General, the parties filed cross motions for summary judgment. On September 24, 2009, the district court granted the Louisiana Attorney General's motion for summary judgment and denied Petitioners' motion for summary judgment. The court held that the Compact Clause claim "fails as a matter of law," Pet. App. B15, because there is no "actual or potential encroachment or interference" with federal supremacy, *id.* B13. The court went on to find that even if congressional consent were required, "Congress has plainly provided it" when it amended the Medicaid statute in 1999 "and disclaimed any

federal interest in the moneys received by the Settling States pursuant to the Agreement." *Id.* B14. *See* 42 U.S.C. §1396b(d)(3)(B)(i-ii). The court did not address Petitioners' antitrust contentions as a separate claim, but instead treated them as one element of Petitioners' Compact Clause claim, consistently with the treatment of those contentions in Petitioners' complaint and in the earlier Magistrate Judge's Report. In a footnote in its opinion, the district court addressed Petitioners' Compact Clause "antitrust policy" argument by summarizing the opinions of other courts that had previously rejected claims that the MSA or related statutes are preempted under the antitrust laws, but the court had no occasion to address the issue of state-action immunity under *Parker v. Brown*, 317 U.S. 341 (1943), and did not do so. Pet. App. B10 n.7.

3. The Fifth Circuit affirmed unanimously on August 10, 2010. *First*, applying the test in this Court's decision in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), the Fifth Circuit held that the MSA did not require congressional consent under the Compact Clause for the same reasons that the Fourth Circuit had earlier reached the same conclusion in *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002). Pet. App. A5-7. The court did not address the district court's additional finding that, if congressional consent were required, Congress had provided it.

Second, the Fifth Circuit noted that – insofar as it related to the Escrow Statute – any antitrust challenge was foreclosed by its earlier decision in *Xcaliber International Ltd. v. Caldwell*, 612 F.3d 368 (5th Cir. 2010). Pet. App. A8. Recognizing, however, that *Xcaliber* had involved a challenge only to the Escrow Statute, the Fifth Circuit went on to consider "whether the MSA and Escrow Statute working together create an antitrust violation." *Id.*

The Fifth Circuit began its analysis by noting that "[w]hether the MSA and Escrow Statute violate federal antitrust laws has been addressed by the Sixth, Eighth, and Ninth Circuits, and all of those courts have rejected the plaintiffs' arguments." *Id.* The court then quoted from the Sixth Circuit's decision in *Trident International Corp. v. Kentucky*, which it said "aptly described the argument the present plaintiffs raise and why it must be rejected." *Id.* A9. In *Trident*, the plaintiffs had alleged that the Kentucky Escrow Statute was inconsistent with – and hence preempted by – the Sherman Act because it was "enacted by Kentucky to effectuate the provisions of the MSA [and] punishes NPMs and rewards SPMs – a practice that constitutes an 'illegal *per se* output cartel.'" 467 F.3d at 555. In affirming the grant of a motion to dismiss, the Sixth Circuit recognized that Sherman Act preemption arises only if Kentucky's Escrow Statute "'mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.'" *Id.* at 554 (quoting *Rice v. Norman Williams Co.* 458 U.S. 654, 661 (1982)). The Sixth

Circuit then reasoned that because Kentucky "neither mandated nor explicitly authorized" the PMs to engage in *per se* violations of the antitrust laws following the MSA's execution, Tritent's argument on this issue was foreclosed. *Id.* at 557.

After quoting from the Sixth Circuit's decision in *Tritent*, the Fifth Circuit concluded:

> We agree with the Sixth Circuit and the other circuits that have already considered the issue of whether the MSA and Escrow Statute violate the Sherman Act, and we adopt their rationale. Accordingly, we find no merit to the plaintiffs [sic] arguments that the MSA and Escrow Statute violate federal antitrust laws.

Pet. App. A10.

REASONS FOR DENYING THE PETITION

The Petition should be denied, much like the twenty-some similar federal court challenges to the 1998 MSA that have preceded it and been unanimously rejected. In the 12 years since the MSA went into effect, this Court has denied *six* petitions for certiorari raising one or both of the issues now re-raised by Petitioners. *See Grand River Enter. Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009), *cert. denied sub nom. Grand River Enter. Six Nations, Ltd. v. McDaniel*, 130 S. Ct. 2095 (2010) (Sherman Act); *Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007), *cert. denied*, 553 U.S. 1031 (2008) (Sherman Act); *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179 (2004) (Sherman Act and Compact Clause standing); *Star Scientific, Inc. v. Beales*, 278

F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002) (Compact Clause); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002) (Sherman Act); *Hise v. Philip Morris Inc.*, 46 F. Supp.2d 1201 (N.D. Okla. 1999), *aff'd mem.*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000) (Sherman Act and Compact Clause). Nothing material has changed since this Court first declined to review these issues in 2000. No split of authority has developed. To the contrary, decisions rejecting legal challenges to the MSA have stacked up, and this Court has repeatedly denied certiorari. There is no reason for a different outcome here.

Indeed, this case is a uniquely poor vehicle for reviving Petitioners' claims against the MSA. The Fifth Circuit did not even reach the first purported "question presented." Pet. i. The Court of Appeals denied Petitioners' antitrust claim on an antecedent question and thus did not resolve the *Parker v. Brown* state-action immunity issue at all. And with respect to the Compact Clause question, Petitioners themselves concede that the Fifth Circuit merely "adopted" the Fourth Circuit's reasoning in *Star Scientific, Inc. v. Beales* rather than "[o]ffering . . . its own" analysis. Pet. 27. This Court, of course, declined to review *Star Scientific*'s reasoning nine years ago, and Petitioners point to no compelling reason why the Fifth Circuit's mere adoption of the Fourth Circuit's reasoning strengthens the case for certiorari. The Fourth Circuit's reasoning, in any event, was consistent with this Court's jurisprudence and correct. The Court should treat this Petition no

differently from the other petitions challenging the MSA that it has uniformly denied over the past decade.

I. THE ISSUE OF STATE-ACTION IMMUNITY WAS NOT RULED ON BY THE COURTS BELOW, AND IN ANY EVENT APPLYING SUCH IMMUNITY TO DEFEAT ANTITRUST CHALLENGES TO THE MSA WOULD BE ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *PARKER V. BROWN* AND THE DECISIONS OF OTHER APPEALS COURTS.

1. Petitioners contend that the Court should grant their Petition because the Fifth Circuit incorrectly applied the state-action immunity doctrine of *Parker v. Brown*. The *Parker* immunity issue was not properly raised below, however, and the Fifth Circuit did not address or decide it. There is no warrant for this Court to resolve an issue never resolved below, and the Petition's efforts to obtain this Court's review on a purely academic question only underscore the absence of any necessity for this Court's review.

Indeed, the Fifth Circuit's sole mention of *Parker* came in describing the *second* step of petitioners' two-step antitrust claim. *See* Pet. App. A7 ("The plaintiffs . . . argue that the MSA and Escrow Statute are *per se* violations of the Sherman Act . . . . The plaintiffs further assert that the only defense *potentially* available to the Attorney General is the implied state-action immunity found under *Parker v. Brown*.") (emphasis added). The Fifth Circuit set out to address "whether the MSA and Escrow Statute working together create an antitrust violation," *id.* A8, and concluded that there was "no merit to the

plaintiffs [sic] arguments that the MSA and Escrow Statute violate federal antitrust laws." *Id.* A10. As it found no Sherman Act violation, it saw no need to consider the "potential[]" *Parker* "defense" to a violation that did not exist. Pet. App. A7; *see also Fisher v. City of Berkeley*, 475 U.S. 260, 270 (1986) (having found that municipal ordinance is not inconsistent with the antitrust laws, Court "need not address whether, even if the controls were to mandate §1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny.").

The Fifth Circuit's reliance on the Sixth Circuit's decision in *Trident International Corp. v. Kentucky* underscores that it did not reach the *Parker* immunity issue. The Fifth Circuit quoted an entire paragraph from *Trident* in which the Sixth Circuit reasoned that Kentucky had "neither mandated nor explicitly authorized" the PMs to engage in *per se* violations of the antitrust laws following the MSA's execution. Pet. App. A9-10 (quoting *Trident*, 467 F.3d at 557). That quoted paragraph in the *Trident* opinion came right before the Sixth Circuit stated, in no uncertain terms, that "[b]ecause Trident has failed to satisfy the first prong of Sherman Act preemption analysis, *we need not consider the second prong's Parker state-action immunity doctrine*." *Id.* at 558 (emphasis added).[6] Like the Sixth Circuit,

[6] Similarly, the Fifth Circuit's reliance on the Eighth Circuit's decision in *Grand River Enter. Six Nations, Ltd. v. Beebe*, 574 F.3d at 936-38, and the Ninth Circuit's decision in *Sanders v. Brown*, 504 F.3d at 908-11, was limited to the portions of those decisions that held there was no *per se* violation of the Sherman Act, and did not include their subsequent discussions of state-action immunity

the Fifth Circuit was thus crystal clear in rejecting Petitioners' antitrust arguments based on its examination of the effects of the MSA and Escrow Statute on competition – without even reaching the issue of *Parker* state-action immunity.

Accordingly, Petitioners have it exactly backwards when they assert that "the court did not dispute the unchallenged proposition that the MSA itself was an agreement in restraint of trade and a *per se* violation of the Sherman Act," and "addressed only whether defendant was entitled to invoke 'state-action' immunity as originally set forth in this Court's decision in" *Parker*. Pet. 12; *see also id.* 17 ("The Fifth Circuit's sole basis for declining to apply the Sherman Act to the MSA was the state-action immunity defense . . . in *Parker*"). In reality, the Fifth Circuit addressed only the first, antecedent question of whether the MSA was a violation of the Sherman Act – a proposition, for that matter, which went far from "unchallenged."

It is well-established that this Court "do[es] not decide in the first instance issues not decided below.'" *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, ___, 129 S.Ct. 788, 798 (2009) (quoting *National Collegiate Athletic Ass'n. v. Smith*, 525 U.S. 459, 470 (1999)). That prudential rule applies even when the issues may well pique the curiosity of the professoriate. The primary issue in the Petition is an entirely academic question about the contours of *Parker* immunity that is nowhere discussed and nowhere raised by the decision below.

2. Petitioners try to create the impression that the *Parker* immunity issue is relevant by treating

the validity of their antitrust claim as a foregone conclusion. *See, e.g.*, Pet. 12 ("unchallenged proposition that the MSA itself was an agreement in restraint of trade"); *id.* 18 ("an admittedly *per se* illegal agreement between private parties"). As discussed above in the Statement, however, Petitioners' allegations concerning the effect of the MSA on competition do not comport with the facts and have been rejected by every court that has considered similar allegations. As a result, these courts have held that the MSA does not mandate or authorize private or hybrid[7] *per se* violations of the antitrust laws in all cases. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d at 938-39; *Sanders v. Brown*, 504 F.3d at 919; *KT&G Corp. v. Attorney General of State of Oklahoma*, 535 F.3d at 1132; *Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d at 696.

3. Even if this Court were inclined to consider for the first time in this litigation the state-action immunity issue that Petitioners attempt to raise, it should deny the Petition. Petitioners point to no conflict among the circuits on the applicability of *Parker v. Brown* to state action like that of the predecessor of Respondent Attorney General of Louisiana in signing the MSA on behalf of his state, including the cases in which the MSA itself has been

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[7] A hybrid restraint of trade arises when a state grants a private party "a degree of private regulatory power" that allows that party to compel other private actors to follow its pricing or other "private marketing decisions." *Fisher v. City of Berkeley*, 475 U.S. at 267-68.

at issue.[8] Moreover, the question whether *Parker* immunity applies to an agreement that simply provided a common framework for settling litigation between multiple states and private companies has not previously arisen in any other context. Nor, in view of the unique character of the MSA, is it likely to arise in the future. Petitioners do not urge the contrary. Rather, because Petitioners view the MSA as an "abomination," Pet. 37, they ask the Court to single it out for examination and "to offer an authoritative and definitive evaluation of that scheme" in light of federal antitrust law and the Compact Clause, *id.* 37-38 – an evaluation that is unlikely to have any significance beyond the context of the MSA, or within it for that matter.

4. Finally, Petitioners' contention that *Parker v. Brown* immunity should for the first time be held limited in application to actions by a single state that have effects only within that state, Pet. 19-20, has no basis in authority or logic. Even the *Parker* decision itself involved an alleged multi-state restraint – a California program that eliminated price competition among raisin producers, 95 percent

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[8] *Amici* Antitrust Law Professors assert that a conflict exists among circuits concerning the relationship among *Hoover v. Ronwin*, 466 U.S. 558 (1984), *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Rice v. Norman Williams Co.*, as applied to the antitrust implications of the MSA. Brief at 6-7. No such conflict exists, however, and no court—including the Fifth Circuit in this case—has shown any confusion in applying those precedents. In any case, even if it were otherwise, this case would not be an appropriate vehicle for clarifying the interaction between *Midcal* and *Rice* because the decision below did not address those decisions.

of whose crop was sold in, and had a "substantial effect on," interstate and foreign commerce. 317 U.S. at 359. Moreover, the *Parker* Court relied on the statutory language as well as "the purpose, the subject matter, the context and the legislative history" of the Sherman Act in holding that the state is not a "person" for purposes of the statute. *Id.* at 351-52. The Court noted that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351. The Court concluded that "the Sherman Act . . . must be taken to be a prohibition of individual and not state action." *Id.* at 352. That Louisiana joined with other states in settling their lawsuits against the major tobacco companies does not affect the Court's holding that the state is not a "person" within the scope of the antitrust laws, nor does it mean that the actions of Louisiana's executive, legislative, and judicial branches in entering into and approving the MSA were not actions of the state.

II. Whether the Fifth Circuit correctly applied this Court's settled rule for assessing whether an interstate agreement violates the Compact Clause does not merit this Court's review.

Nine years ago, this Court denied a certiorari petition which sought review of a Fourth Circuit decision holding that the MSA did not violate the Compact Clause. *Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002). As Petitioners note, the Fifth Circuit merely "adopted" the Fourth Circuit's reasoning, and nothing has happened since 2002

that warrants a different course now. This Court has not issued any intervening decision that bears on the issue and no circuit split has arisen – all six courts to have addressed whether the MSA requires congressional approval have held it does not.[9] The absence of any conflict among the courts is unsurprising given the clarity of the governing test, under which congressional approval is required only of those agreements among states that "enhance[] state power *quoad* the National Government." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978) ("*MTC*"). Petitioners' contention that the Fifth Circuit misapplied that settled law does not merit this Court's review. Certiorari is also unwarranted for another reason: As the district court held, even if the MSA needed congressional consent, Congress provided it. Pet. App. B14-15. Any ruling by this Court on whether the MSA requires congressional approval would thus be purely academic.

1. More than a hundred years ago, this Court recognized that the Compact Clause could not reasonably be read to apply to *every* agreement among multiple states. In *Virginia v. Tennessee*, 148 U.S. 503, 518, 519 (1893), the Court observed that many interstate agreements "can in no respect concern the United States" and concluded that the Compact Clause applies only "to the formation of any

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[9] *See Star Scientific*, 278 F.3d at 360; *Mariana v. Fisher*, 226 F. Supp. 2d 575, 586-87 (M.D. Pa. 2002); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1197-98 (C.D. Cal. 2000); *Hise*, 46 F. Supp. 2d at 1210 (allegation of "unlawful confederation"); Pet. App. B9-15.

combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." In *MTC*, the Court reiterated that rule, 434 U.S. at 460, and upheld the Multistate Tax Compact, which resulted in reciprocal legislation by more than 20 states and the establishment of a quasi-independent administrative body to coordinate state taxation of certain entities.

The Court found that, although the agreement may have "increase[d] the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions," it did not "enhance[] state power *quoad* the National Government." *Id.* at 473. The Court recognized that "[g]roup action in itself may be more influential than independent actions by the States," but observed that each of the tax commission's actions could have been taken separately by the individual states themselves. *Id.* Finally, the Court clarified that an interstate agreement does not require congressional approval merely because it "implicates some federal interest"; only agreements that pose "a threat of encroachment or interference through enhanced state power" do so. *Id.* at 479-80 n.33. *See also Northeast Bancorp, Inc. v. Bd. of Governors of Federal Reserve Sys.*, 472 U.S. 159, 175-76 (1985) (reaffirming *MTC*).

2. The MSA does not require Congress's consent under this settled jurisprudence. As the Fifth Circuit explained,

> the [MSA] may result in an increase in bargaining power of the States *vis-à-vis* the

> tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the [MSA] "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."

Pet. App. A6-7 (quoting *Star Scientific*, 278 F.3d at 360 (quoting *MTC*, 434 U.S. at 473)).

Indeed, as Judge Niemeyer observed for the Fourth Circuit, the MSA "principally operates vertically between each State and the signatory tobacco companies, providing releases from liability to the tobacco companies in exchange for conduct restrictions and payments." *Star Scientific*, 278 F.3d at 360. Such "vertical" agreements between individual states and tobacco companies do not even implicate the Compact Clause. *Id.*

The MSA operates "horizontally" between the States only in providing that third parties will perform certain useful but limited administrative functions. In particular, the MSA requires the parties to select a "Firm" of economic consultants to make certain determinations that are conditions precedent to one of the potential payment adjustments in the MSA, the NPM Adjustment. For example, were there to be a dispute between the PMs and a state as to whether the state's Escrow Statute is a "Qualifying Statute" as defined in Section IX(d)(2)(E), the firm would decide it. *See* MSA §IX(d)(2)(G). In addition, the MSA requires the parties to select an "Independent Auditor" (*i.e.*, an accounting firm) to calculate the exact payments due each year under the MSA from each PM, and their

allocation among the Settling States, according to formulas specified in the MSA. *See id.* §XI. Lastly, the MSA assigns to the National Association of Attorneys General ("NAAG") certain implementing and coordinating functions on behalf of the Settling States, including the monitoring of potential conflicting interpretations of the MSA by courts in the various Settling States. *See id.* §§II(bb); VII(f), (g); VIII(a), (c). It is difficult even to conceive how states' agreement to use the same economic and accounting experts and their Attorneys General's membership organization to help administer a complex payment mechanism and help ensure consistency in the interpretation of the MSA could be considered to encroach on federal supremacy.

Petitioners' complaint that the MSA binds the states into the future is both misplaced and wildly overblown. *See* Pet. Br. 26, 28; *see also* Amicus Brief of Constitutional Law Scholars ("Amicus Br.") 14-16. The states have agreed to receive significant Annual Payments from PMs in perpetuity in exchange for waiving certain specified claims they had or might in the future have against the PMs. The states have also agreed to have the Firm, the Independent Auditor, and NAAG continue to perform certain implementing and coordinating functions, described above, into the future. The states could have individually settled their lawsuits against the PMs with the same or fully equivalent terms. There is nothing "particularly pernicious" (Amicus Br. 14) about those settlement terms, and nothing about them that remotely encroaches on federal supremacy.

Moreover, as the Fourth Circuit further observed, the MSA took care to ensure that it "does not derogate from the power of the federal government to regulate tobacco. Sections X and XVIII(a) of the agreement specifically anticipate that Congress may, in the future, pass laws regulating tobacco and provides [sic] for adjustments of the [MSA's] terms if that occurs." *Star Scientific*, 278 F.3d at 360.[10] Accordingly, although the MSA undoubtedly touches upon matters of federal "interest," it does not "infringe federal supremacy." *Northeast Bancorp*, 472 U.S. at 176.[11]

3. Petitioners contend that the Fifth Circuit erred in holding that the MSA does not require congressional approval. This Court does not, of course, grant certiorari merely to correct errors by lower courts, and Petitioners' evident dislike for the MSA is hardly reason to make an exception. Petitioners' criticisms of the Fifth Circuit are, in any event, unfounded.

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[10] Section X addresses the consequences of federal tobacco-related legislation enacted on or before November 30, 2002. Section XVIII(a) provides that "[i]f any current or future law includes obligations or prohibitions applying to Tobacco Product Manufacturers related to any of the provisions of the Agreement, each Participating Manufacturer shall comply with this Agreement unless compliance with this Agreement would violate such law."

[11] Petitioners note several purported factual differences between the MSA and the Multistate Tax Compact at issue in *MTC*, Pet. 26-27, but none of those differences bears on the application of the guiding rules set forth in *MTC*.

Petitioners' principal contention appears to be that the Fifth Circuit somehow failed to heed the Court's statement in *MTC* that "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy." 434 U.S. at 472, *quoted in* Pet. 27. But Petitioners' "potential encroachment" theory is little more than an effort to repackage failed statutory and constitutional arguments in the guise of a Compact Clause claim. In the end, they fail to show how the MSA even potentially encroaches on federal power.

For example, the Fifth Circuit rejected Petitioners' claim that the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1334, preempts the MSA because the Agreement's voluntary advertising, promotional, and marketing restrictions do not fall within the scope of the statute's preemption provision, which applies only to any "requirement or prohibition . . . imposed under State law." Pet. App. A13-14. Petitioners nonetheless argue that the MSA's voluntary advertising restrictions have the "potential" to encroach on federal supremacy. Pet. 31-32. But those voluntary advertising restrictions are not now, and never will be, a "requirement or prohibition" that Congress sought to oust. Although those restrictions may touch upon a matter of federal "interest," it is impossible to see how states engaging in conduct Congress chose *not* to preempt "enhances state power *quoad* the National Government." And that is so whether the states engage in that conduct through 46 separate agreements or one master agreement signed by multiple states. *See MTC*, 434 U.S. at 472 ("[t]he number of parties to an

agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy.").

At bottom, Petitioners' argument appears to be premised on the fact that the MSA touches on a variety of matters that are of federal interest. But, as explained above, this Court in *MTC* expressly held that "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant." 434 U.S. at 480 n.33. In sum, the Fifth Circuit's ruling, like the Fourth Circuit's before it, is firmly grounded in this Court's precedents.

Lastly, Petitioners assert that the Fifth Circuit erred because the MSA potentially encroaches upon "sister-state interests." Pet. 33. This error-correction argument also fails on its own terms. First, it is far from clear that Petitioners even have standing to assert state sovereignty interests. *See Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939). Second, no state has objected to the MSA, and if such an objection were made, the Court in *MTC* expressly dealt with how it should be resolved:

> Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, 2, it is not clear how our federal structure is implicated.

434 U.S. at 478 (citation omitted). The MSA does not "transgress[] the bounds of the Commerce Clause," the First Amendment, the FCLAA, or the Sherman Act. The "federal structure is" therefore not "implicated," and the Compact Clause did not require congressional consent.

4. Certiorari is not warranted on the question whether congressional approval of the MSA was required by the Compact Clause for an independent reason: Even if congressional consent to the MSA were required, Congress provided it in 1999 when it amended the Medicaid Act to disclaim any federal interest in the moneys received by the states under the MSA in settlement of their claims, *inter alia*, for Medicaid payments made by the states. This Court has long held that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *see also Virginia v. Tennessee*, 148 U.S. at 521-22. Moreover, "the constitution makes no provision respecting the mode or form in which the consent of congress is to be signified." *Green v. Biddle*, 21 U.S. 1, 85-86 (1823). "The only question in cases which involve that point is, has congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?" *Id.* at 86. Here, as the district court correctly held (Pet. App. B14-15), the answer is yes.

When Congress amended the Medicaid statute in 1999, it expressly disclaimed any claim for reimbursement of the federal share of Medicaid

payments from MSA settlement payments, stating that the relevant federal rules

> shall not apply to any amount recovered or paid to a state as part of *the comprehensive settlement of November 1998* between manufacturers of tobacco products . . . and State Attorneys General, ... *[A] State may use amounts recovered or paid to the State as part of a comprehensive . . . settlement, . . . for any expenditures determined appropriate by the State.*

42 U.S.C. §1396b(d)(3)(B)(i-ii) (Supp. V 1999) (emphases added). Through this provision, Congress recognized the MSA's existence, disclaimed any federal interest in the moneys received by Louisiana and other states under the agreement, and authorized the states to use MSA funds "for any expenditures determined appropriate." The inference is "clear and satisfactory" that Congress "necessarily consented to the agreement of th[e] States on th[e] subject." *Virginia v. W. Virginia*, 78 U.S. 39, 60 (1870). Were there any doubt that Congress by this enactment approved the States' decisions to enter the MSA, the Conference Report accompanying the Medicaid Act amendment dispels it. The Report expressly stated that Congress's purpose in disclaiming its interest was to avoid needless litigation by providing certainty and finality to the states in their use of the MSA funds.[12]

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[12] *See* House Conf. Rep. 106-143, 106th Cong. 1st Sess., Pub. L. No. 106-31, Emergency Supplemental Appropriations, May 14, 1999, 1999 U.S.C.C.A.N. 27.

Petitioners argued below that, notwithstanding the Medicaid amendment's explicit reference to the MSA and the states' use of MSA funds, Congress did not properly "consider[] the substance of the MSA or the Compact Clause implications of its actions" because the 1999 Medicaid amendment was "obscure." C.A. Br. 56. Congress is presumed, however, to be fully aware of its enactments. *See Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Nor does it matter that Congress acted through an appropriations bill. As noted, the Constitution requires no particular form by which Congress must approve a compact, and Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992). Petitioners cannot credibly dispute that Congress amended the Medicaid statute with a specific reference to the MSA, and that the amendment effected a change in law.

The Fifth Circuit did not reach the issue of congressional consent because it concluded – like every other court to address the issue – that no such consent was required. The fact of Congress's consent, however, makes the question presented by Petitioners entirely academic. Even if they were correct that congressional consent were required – and they are not – it would not change the outcome of this case and the continuing validity of the MSA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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